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Supreme Court, U.S.
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No. 01-1829

IN THE

Supreme Court of the United States

DELTA AIR LINES, INC.,

Petitioner,

v.

PENNY FERRIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this case, the Second Circuit Court of Appeals denied an airline's motion for summary judgement against a flight attendant who brought a lawsuit after she was raped by a fellow flight attendant during an overseas layover. The Court of Appeals held that a reasonable jury could find that a block of hotel rooms, reserved and paid for by the airline could be found to be a work environment within the meaning of Title VII in view of the unique circumstances surrounding foreign layovers, which flight attendants are mandated to take. The Court of Appeals also held that a jury could reasonably find that the airline was responsible for the rape because it was on notice of the perpetrator's "proclivity to rape co-workers."

Should this Court grant *certiorari* to decide whether sexual harassment that takes place in hotel rooms reserved by an employer for their employees occurs in a "work environment" within the ambit of Title VII, where that question turns on the set of circumstances that surround the lodging of an airlines' flight crew during a brief layover in a foreign country? *See.* Pet. App. 11a-14a.

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COUNTERSTATEMENT OF THE CASE

The Court of Appeals for the Second Circuit accurately set forth the facts pertinent to Respondent's claims under Title VII.[1] (Appendix to Delta Air Lines, Inc.'s Petition for Writ of *Certiorari* ("App") 2a-10a). Delta Air Lines, Inc. ("Delta"or "Petitioner") states that the facts contained in the Petition are "materially undisputed." This is not true. The following information is submitted to clarify the record.

1. Evidence of The Nexus Between The Layover Hotel Room and Delta's Work Environment.

Delta argues that flight layovers, and the hotel rooms flight attendants stay in during these layovers, are too far removed from its workplace to fall within the ambit of Title VII. The record below contradicts Delta's argument and demonstrates a strong nexus between the layover hotel room and Delta's work environment.

A significant part of Delta's workforce are its flight attendants who service flights to destinations all over the world. The Federal Aviation Administration mandates that flight attendants who fly a certain number of hours must be provided with a rest period before continuing to service additional flights. A flight attendant on an overseas flight must layover in a foreign city to rest and recuperate before she can work another flight. (Joint Appendix in support of the appeal to the Second Circuit ("JA") A-410-12, A-641-42, A-820: 15-25, A-821:2-11). In accordance with these regulations, Delta reserves and pays for blocks of rooms in hotels in foreign cities for their flight crew to have this

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1. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2.

opportunity to rest. (App. 12a). Delta also ensures that its flight attendants can easily travel to and from the airport by providing ground transportation. (*Id.*). Although it is not mandatory for flight attendants to stay in the accommodations paid for by Delta, they generally do so because they will "most likely [not] speak the local language" and "in all likelihood do not have family, friends, or their own residences" in these foreign cities. (*Id.*). While staying at layover hotels, it is commonplace for crew members to socialize with each other. "In those circumstances the crew members will have no other acquaintances in this foreign place and will band together for society and socialize as a matter of course in one another's hotel rooms." (App. 12a, JA A-280 p. 323: 12-24, A-646: 4-14, A-895 pp. 75: 13-25, 76: 1-7).[2] As the Second Circuit noted: "Even though the employer does not direct its employees as to how to spend their off-duty hours, the circumstances of the employment tend to compel these results." (App. 12a).

2. Delta Had Notice That Young Presented a Serious Threat To The Airline's Female Flight Attendants.

Delta grossly misrepresents the facts pertaining to the nature of the physical assaults and intimidating harassment

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2. At her deposition, Ferris was asked how common it was for crew members to visit each other's rooms at a layover hotel:

> It's a frequent thing. It's like a fraternity on the airlines. We all do that. On different layovers we go to other people's rooms. We trust one another. We rely on each other when we're on the aircraft. And sometimes when we're –during layovers we rely on each other too.

(JA A 280 p. 323: 12-24).

by Young against three separate Delta Flight Attendants who reported this conduct to Delta prior to the date on which Ferris was raped. The reason for this is obvious. Petitioner attempts to trivialize the reports received from three Delta Flight Attendants accusing Young, by name, of rape, sexual harassment and threat of physical harm, as well as the anonymous letter received by Delta's Corporate Security office from yet a fourth flight attendant, claiming that he or she was intimidated by Young's conduct,[3] in order to escape liability for the devastating injuries suffered by Ferris at the hands of Young.

A. Kathleen Ballweg

In 1992 or 1993, while on a layover in Milan, Italy, Ballweg joined Young in Florence for a little over a day. (App. 6a). Ballweg spent part of the night in the hotel room with Young. She did so with no intention of engaging in a sexual encounter, as Delta suggests. (Petition p. 6-7). Rather, Young used a ploy to convince Ballweg, who had planned to spend the night alone, to let him stay in her room, and share a bed: He stated it was too late to return to his mother's home in Florence, and that he did not have a key. (JA A-815 pp. 39-40). Despite her reluctance, Ballweg permitted Young to stay in the room with her because she trusted him as a fellow crew member. (JA-815 p. 40: 5-9). There was no "consensual kissing" as Delta alleges (Petition p. 6), nor did Young's actions continue beyond a point with which Ballweg was

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3. In August, 1997, Delta's Corporate Security Office received another complaint about Young's dangerous conduct from a Delta Flight Attendant who was too afraid of Young to sign his or her name. This unidentified flight attendant wrote that Young regularly purchased steroids abroad and brought them into the United States and that he or she was intimidated by Young because of the attack on Delta Flight Attendant, Michelle Zachery (*infra* p. 7). (JA A-496).

"simply uncomfortable." (Petition, p. 7). Rather, Young raped Ballweg in that bed in the hotel room in Florence, and the Second Circuit understood this attack as such. (App. 6a).

After he raped Ballweg, Young made unwanted sexual overtures, which intimidated and frightened her, back in the layover hotel in Milan and then upon their return to the United States. Once back in the United States, Young tracked down Ballweg's unlisted telephone number and made unwanted and harassing phone calls to her home. (JA A-823-824). Fearful of encountering Young again, in the course of her work for Delta, Ballweg complained to a Delta Duty Supervisor at John F. Kennedy Airport ("JFK"), in New York City ("NYC"). Ballweg *clearly* communicated to this Supervisor that she had been sexually attacked by Young. (App. 7a, JA A-827 p. 86). She also told the Duty Supervisor that she was afraid that Young might use his close proximity to female Delta Flight Attendants while traveling or staying at layover hotels to victimize other flight attendants. Ballweg told the Supervisor that she wanted Delta to put "something on the record" in the event Young attacked another flight attendant. (App. 7a, JA A-827, A-875).[4]

Approximately one year after the rape, Ballweg encountered Young on a layover in Frankfurt. Young called Ballweg several times in her hotel room, asking her to spend

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4. Ballweg stated to the Supervisor:

> I want to give you a heads up because if this is the only incident then its okay, but I think you should know in case something like this comes up again, because then you might know this person is out there . . . I just wanted them to know that I thought he was dangerous potentially. (JA A-827 p. 85: 12-23).

the night with him and "berating her with comments about sex." (App. 7a). For a second time, Ballweg reported Young's sexual attack to a Delta Duty Supervisor. (*Id.*). She told that Supervisor about the attack in Florence and that she was fearful that Young was potentially dangerous to herself and other Delta female flight attendants. (App. 7a, JA A-835, A-868, A-870, A-875).

Despite these two complaints about a serious sexual assault by one Delta Flight Attendant against another, "Delta took no action in response to Ballweg's reports." (App. 7a).

B. Aileen Cori Feingold

In about March of 1995, after Ballweg twice complained to Delta about Young's sexual attack in Florence, Young raped another Delta Flight Attendant, Aileen Cori Feingold ("Feingold"). Feingold was on her way to jet recurrent training in Atlanta, Georgia when she stopped in Dallas, Texas to visit Young. (JA A-761). Feingold and Young had met in the course of working for Delta. Feingold agreed to stay at Young's home on the understanding that she would sleep in a separate bedroom. (App. 7a-8a). That night, after going to sleep alone in that separate bedroom, she awoke to find Young in her bed, naked and physically restraining her. There, Young raped Feingold (JA A-772-774).[5] The Second Circuit recognized that in fact a rape had been committed. (App. 8a).

After Feingold was raped, Young harassed her by leaving intimidating telephone messages at her home, and by sending threatening e-mail messages, using Delta's e-mail system.

5. There was nothing consensual about this act, as Delta insinuates. (*see* App. 79a, (an excerpt of the deposition of Feingold) where Petitioner's counsel, and *not the witness*, repeatedly states that the touching between Young and Feingold included fondling).

(App. 8a, JA A-786, pp. 220-221). Feingold contacted Nancy Ruhl ("Ruhl"), then a Delta Base Manager, based at JFK, and reported that she had been raped by Young and that he was harassing her and threatening her with physical violence. (App. 8a, JA A-757-758, A-786, p. 221: 6-25 A-222-223). Feingold told Ruhl that she wanted to file a formal complaint and that she was afraid of what Young might do to other unsuspecting Delta flight attendants because he had his "method of operation down too pat." (App. 8a, JA A-789 p. 232: 11-19). Ruhl promised to take care of the situation and said it was not necessary for Feingold to file a written complaint. (App. 8a, JA-790-791). The next day Ruhl called Feingold and told her that she had talked to Young. (App. 8a-9a). She stated that Young would not bother her again, and warned her not to talk to anyone about what had happened. (*Id.*).

Despite these complaints about another Delta Flight Attendant being raped by Young, "Delta took no action in response to Feingold's report." (App. 9a).

Feingold filed an action in the United States District Court for the Northern District of Texas, *Feingold v. Delta Air Lines, et. al.*, 1999 U.S. Dist. LEXIS 21962 (N.D. Texas 1999), *aff'd* 2002 U.S. App. LEXIS 11532 (5th Cir. 2002). Feingold did not bring a cause of action under Title VII.

C. Michelle Zachry

Delta would like this Court to overlook Young's threatening conduct toward yet a third Delta Flight Attendant, Michelle Zachry ("Zachry"); conduct which occurred less than one year before Ferris was raped by Young. For some inexplicable reason, the District Court below erred in completely ignoring

the evidence in the record pertaining to Young's harassment of Zachry. (App. 19a-42a). On appeal, the Second Circuit did not. (App. 9a-10a).

Zachry was sexually harassed by Young in 1997 on a Delta airplane on route to Rome, and during a layover after that flight. (App. 9a). Zachry had also been harassed by Young on the airport tarmac, as she was approaching the aircraft.[6] Upon landing in NYC, Young approached Zachry and began cursing and screaming at her.[7] Later in 1997, Young called Zachry obscene names and threatened her with physical harm while both were traveling on a Delta tram. (App. 9a-10a).[8] Zachry complained to Delta management on two occasions about Young's conduct. (App. 9a -10a, JA A-887: ¶¶ 19-21-A-888 ¶¶ 22-24, A-921).

Despite these serious complaints, again "Delta took no action in response to Zachry's report." (App. 10a).

Throughout the rest of Young's employment with Petitioner, Ballweg, Feingold and Zachry remained fearful of encountering him again on future flights they flew for Delta. As a result of this fear, each tried as best they could to check his schedule and avoid flying with him. (App. 7a, 10a,

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6. As both Zachery and Young were walking toward the aircraft, Young said to her: "If the wind blows I get hard." (JA A-886: ¶ 3).

7. His exact words were: "You fucking Dallas girl, you say you are going to do one thing, and you do another, all of you are the same." (JA A-887: ¶ 13).

8. Young yelled in a threatening fashion: "(F)ucking bitch — if I ever hear my name uttered from your lips, I'll hunt you down. I'll get you. I'll find you, you bitch." (JA A-887: ¶ 17).

JA A-824, A-927-928: 4-19). Ballweg warned many Delta Flight Attendants about Young's propensity for violence. (App. 7a). Unfortunately, Ferris was not one of the flight attendants she warned.

3. Events Giving Rise To This Lawsuit.

Although the nature and extent of the sexual assault of Ferris by her co-worker Young in Rome, Italy, is not directly implicated in the legal questions presented to the Court by the present Petition, Delta nonetheless misrepresents significant portions of the record pertaining to the sexual assault. The reasons for doing so are obvious. Petitioner seeks to shift the blame for its own gross negligence by doing absolutely nothing in response to complaints that Young had raped two other Delta Flight Attendants and physically threatened a third onto Ferris herself — in essence to suggest that Ferris is at least partially responsible for being raped. Ferris does not bear part of the responsibility for Delta's failure, because the employer, Delta, had knowledge about Young's rapes of other Delta Flight Attendants. Ferris, on the other hand did not.

Delta's insistence on labeling Ferris's encounter with Young as a "date," not only distorts the true nature of that encounter, but purports to diminish the value that women, as well as men, gain by engaging in social interactions with co-workers they meet in the course of their employment. It is an outdated notion to believe that a working woman, would only socialize with a co-worker in the workplace because she was interested in striking up a consensual sexual relationship with that individual.

Ferris was not on a "date" when she entered Young's room on March 17, 1998 at the Savoy Hotel ("Savoy") in Rome, Italy. Just as Ferris had done on numerous occasions during her thirty year history of flying, she joined a co-worker in a layover hotel room, after working a flight together, without any interest in striking up a romantic liaison. (JAA-76: ¶ 10, A-280 pp. 321- 323, A-532-33: ¶¶ 2-6). Her intention was to go to Young's room briefly to taste some wine he had just purchased, and then to go shopping that afternoon in Rome; perhaps even to purchase some wine to take home. (JA A-280, A-283-284 p. 337: 1-6). Her conduct amply supports her intentions. Ferris went to Young's room, which had been assigned by Delta across the hall from his, without taking a shower, and wearing sweat pants. It was approximately 11:00 *in the morning* (JAA-284 pp. 337-338), and Ferris had been up all night working with Young and the other flight crew (*Id.*).

Moreover, Ferris did not engage in behavior which was so irresponsible so as to depart from any foreseeable conduct that Delta should have anticipated between its co-workers on a layover. In Young's room, Ferris sipped one half glass or less of wine, which had been already poured in a glass before her arrival (App. 4a), *not* more than one glass as Delta suggests. (Petition p. 4). Thereafter, as Ferris has consistently testified, she blacked out and was partially aware of being sexually violated. She never stated as Delta implies that she was simply aware of "sexual activity," (Petition p. 4), suggesting that Young was engaging in consensual sexual activity with her, or that perhaps she was merely tired or wanted to forget some type of half-hearted consensual encounter. Rather "while [Ferris] was unconscious, Young took off her clothes and raped her vaginally, orally, and anally. She partially

regained consciousness intermittently during the multiple rapes, at one point telling Young to stop before blacking out again." (App. 4a).

In the late afternoon, Ferris fully gained consciousness and was able to make her way back to her own room, where she passed out again. (JA A-310 pp. 442-443, A-311-12, A-314, A-533: ¶ 11). While still in shock, Ferris struggled to join the flight crew for dinner that night during which time period she vomited. (App. 4a). Ferris managed to fly back to NYC the next day. Young was also on that flight. (*Id.*).

After her return to the United States, Ferris reported being raped to Delta. Delta goes to some length to portray Ferris as uncooperative during the investigation of her reports about being raped in Rome. Nothing could be further from the truth. Although in her emotionally traumatized state, Ferris was initially reluctant to name Young, she did inform a Duty Supervisor as early as April 11, 1998 — only three weeks after the rape — that her assailant was the only male Italian speaker aboard the March 16, 1998 flight. (JA A-332, A-362, A-693-95). That Supervisor could have pulled up information about that flight from Delta's computer data base and identified Young within minutes. (App. 4a). Ferris also provided detailed information about the rape to Base Manager Maritza Biscaino ("Biscaino") on April 17, 1998. (App. 5a). However, Delta refused to take any steps in response to Ferris's reports until after she formally named Young as her assailant, on or about May 4, 1998. (*Id.*).

JFK Base Managers, Biscaino and Kevin Grimes ("Grimes") met with Young on May 5, 1998. Although Grimes felt that Young was not forthcoming, was nervous

and that his responses were evasive and inconsistent (JA A-475, A-632-38), Young was nonetheless permitted to leave the meeting and return to work leaving large numbers of female flight attendants vulnerable for almost two months more, until Young was eventually suspended on June 29, 1998. (App. 5a-6a). That suspension took place only *after* Ferris filed a formal written report with Delta, and *after* another Delta Flight Attendant, Carolyn Gordon, came forward with a similar account that she too had been subjected to unwanted sex with Young after being drugged. (App. 5a-6a).

Delta never made attempts to verify Young's whereabouts in Rome during the afternoon of March 17, 1998 (JA A-568-570); despite Young's conflicting stories: Young said during the initial interview with Biscaino and Grimes that he was with a pharmacist friend that afternoon (JA A-566: 15-22, A-635). Later in a written statement, Young said he was at a gym in Rome for several hours during that afternoon. (App. 5a).[9]

Delta did not keep Ferris informed about the outcome of any efforts to investigate her case. Even after the airline suspended Young in June of 1998, and after he resigned in December of 1998, Delta never informed Ferris that Young had been suspended and that she would not encounter him again on any transatlantic flight or at JFK airport, leaving Respondent with a great deal of uncertainty about her safety in Delta's workplace. (JA A-226-227). It was only after all the above actions, and after Delta demanded further

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9. Delta spent considerable time interviewing Young's evening-time alibi, Jaycee Kantz, a patently misguided effort because there was never any doubt that Ferris had informed Delta that the assault had taken place in the afternoon. (App. 6a n.1).

written reports (although these reports were superfluous), that Respondent became frustrated and took legal action against Delta. (JA A-179-180: ¶ 26).[10]

REASONS FOR DENYING THE PETITION

This Petition should be denied. While Delta is understandably dissatisfied with the Second Circuit's decision, that court neither "dramatically" broadened employer liability under Title VII cases for co-worker harassment, nor deviated from well-established principles dictating standards of proof for employer liability.

1. The Second Circuit Applied Prevailing Title VII Law to The Special Factual Circumstances Involving an Airline Employer.

The Second Circuit correctly held that Ferris could establish a claim for a hostile work environment under Title VII because the rape, which occurred in Young's hotel room at the Savoy in Rome, was sufficiently connected to Delta's workplace. (App. 12a).

The Second Circuit correctly defined Delta's work environment to include those locations that the airline could reasonably foresee that its flight attendants would congregate in. The fact that the layover hotel, and Young's room, were not under the direct supervision of Delta's management,

10. Although Delta denies that it has any liability for Young's sexual attack of Ferris, it has vigorously defended the adequacy of its investigation of that incident throughout this litigation. Its positions are clearly inconsistent: Delta does not believe that it had any responsibility for the rape of Ferris, because the assault took place outside of its work environment, and yet it argues that its investigation met standards set by Title VII for responding to allegations about workplace harassment.

and that both Young and Ferris were off-duty at the time of the rape does not preclude Ferris's claim from being recognized under pre-existing Title VII law.

This Court acknowledged in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), that both on site and off-duty incidents of sexual harassment may form the basis of an employee's sexual harassment claim. *Id.* at 60-61, 106 S. Ct. at 2402-03. The Second Circuit's application of the law to the facts of this case are fully consistent with the *Meritor* decision and with other lower court decisions. In those cases, an analysis of employer liability is not limited merely to events which take place on the actual physical premises of the employer, but rather by the court's examination of whether there is an evidentiary nexus between the off-site sexual harassment and the workplace. *See*, e.g., *Pfau v. Reed*, 1997 U.S. App. LEXIS 36770 * 12-13 (5th Cir. 1997) (hostile work environment, sexual harassment claims need not be confined to working hours to affect a term and condition of employment); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F. 3d 1344, 1353 (7th Cir. 1995) (co-worker's actions directed toward plaintiff at a striptease bar and at a lounge, both off-site and after work hours were actionable); *Tomka v. Seilor Corporation*, 66 F. 3d 1295, 1317 (2d Cir. 1995) (off-duty rape by supervisors and co-worker actionable under Title VII: employer could have been liable under a negligence theory for off-duty rape of employee had there been prior reports of sexual assaults or misconduct); *EEOC v. Federal Express Corp.*, 1995 U.S. Dist. LEXIS 22106 * 5 (W.D. Washington 1995) (employer is liable for off-site sexual harassment of one of its employees by a customer because couriers' duties take them onto the premises of FedEx customers); *Huitt v. Market Street Hotel Corp.*, 1993 U.S. Dist. LEXIS 9665 *

14 (D. Kansas 1993) (after hours sexual harassment may be actionable where there are sufficient facts from which to infer a nexus between the sexual conduct and the work environment); *Barrett v. Omaha National Bank*, 584 F. Supp. 22, 29 (D. Neb. 1983), *aff'd* 726 F. 2d 424 (8th Cir. 1984) (off-duty sexual harassment by co-workers, stemming from social encounters while attending a business conference, was work-related and therefore actionable under Title VII).[11]

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11. Under related employee protection statutes, numerous courts have ruled that employees who are sexually harassed or assaulted when off-duty sustain injuries which arise out of and in the course of their employment: **Federal Employer's Liability Act**: *Armstrong v. Burlington Northern R.R.*, 139 F. 3d 1277, 1280 (9th Cir. 1998) (employee may bring action under FELA where assaulted by co-worker during layover in a hotel room provided by railroad); *Empey v. Grand Trunk Western R.R.*, 869 F. 2d 293, 295 (6th Cir. 1989) (employee who is injured while he avails himself of housing which employer has implicitly encouraged him to use was acting within the scope of his employment); *Thomas v. Grigorescu*, 582 F. Supp. 514, 516 (S.D.N.Y. 1984) *aff'd*, 751 F. 2d 371 (2d Cir. 1984) (employee's injury suffered while traveling to and from hotel accommodations provided by employer arose in the course of his employment since employer encouraged its employees to stay at the hotel during layovers); **State Workers' Compensation laws**: *Pan American World Airways v. Wilmot*, 492 So. 2d 1373, 1374 (Fla. Dist. Ct. App. 1986) (flight attendant's injury which occurred during social dinner while on a layover occurred within the scope of her employment); *Jean Barnes Collection v. Elston*, 413 So. 2d 797, 798 (Fla. Dist. Ct. App. 1982) (claimant could bring workers' compensation claim for a rape which occurred in a hotel room because she was acting within the scope of her employment even for the time period when she stayed in her hotel room during a business training); **Insurance Policy Exclusions**: *Scottsdale Insurance Company v. Schola-Fassnacht*, 2000 U.S. Dist. LEXIS 9030 * 8-10 (E.D. Penn., 2000), *aff'd*, without published opinion, 261 F. 3d 493 (3rd Cir. 2001). (Co-worker

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A recent decision in the Fifth Circuit, subsequent to the Second Circuit's ruling, demonstrates that the Second Circuit's decision is in accordance with Title VII law. *Finelli v. Southwest Airlines Co., 2002 U.S. Dist. LEXIS 9755* (N.D. Texas, 2002) *adopted* 2002 U.S. Dist. LEXIS 1365 (N.D. Texas, 2002). In *Finelli*, the plaintiff was terminated for violating the employer's sexual harassment policy because he allegedly sexually assaulted another flight attendant while off-duty during a flight layover. He grieved this disciplinary action, and the arbitrator upheld the airline's decision finding that Southwest Airlines had good cause to fire him. Mr. Finelli filed an action in the district court arguing that because the conduct took place outside of the workplace it was not covered by the collective bargaining agreement. *Id.* at * 7.

The court affirmed the arbitrator's findings which held that:

> The grievant's behavior cannot be excused or overlooked because it occurred off the clock and away from Company property. In general, the employer had no right to control employees when they are not on the clock and on the property.

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harassment occurring outside employer's premises arises out of the employment relationship between the claimant and the employer, therefore, exclusion provision in employer's general liability insurance policy for intentional acts which occur within company's employ is applicable).

In light of these rulings, it is significant to note that the Second Circuit affirmed the dismissal of Respondents' common law negligence claims, holding that exclusive remedy provisions of New York's Workers' Compensation statute precluded these claims in New York. (App. 17a). The basis for that ruling was that Ferris's attack had arisen out of her employment with Delta. (*Id.*).

> However, an exception to the general rule holds when there is a nexus, a relationship, between the errant conduct and the employer's business . . . Off-duty conduct is relevant when the conduct relates to and harms the employer's business.
>
> [I]n a situation where Flight Attendants not only work closely together while on duty, but often eat meals together when off duty, in part as a safety precaution when away from home, the Company has an obligation to ensure as best it can that Flight Attendants are not subjected to improper behavior by fellow employees. Thus nexus clearly exists in this case.
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> *Id.* at * 7-8.

As in the case at bar, Ferris was on a layover in Rome for the benefit of Delta, and consequently, there was a nexus between her socializing with Young and Petitioner's business.

2. The Second Circuit Held That The Evidence In This Case Was Sufficient To Impute Responsibility To Delta For Young's Conduct.

To determine whether Delta was liable for Young's rape of Ferris, the Second Circuit applied this Court's ruling in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (noting agreement among the circuits), which holds that an employer is negligent with respect to sexual harassment if it knew about the harasser's unlawful conduct but failed to take action to stop it. *Id.* 524 U.S. at 799-800, 118 S. Ct. at 2289. (App. 14a). The Second Circuit held that "(g)iven all the circumstances, a reasonable fact finder could

find that Delta was negligent in failing to take steps that might have protected Ferris from Young's proclivity to rape female co-workers." (App. 15a.).

The Second Circuit correctly held that the fact that Ballweg and Feingold were raped while off-duty did not "absolve Delta of all responsibility" to take action in response to those complaints. (App. 16a). The Second Circuit did not delve into the factual scenarios surrounding the sexual assaults of both Ballweg and Feingold. The record, below, however, indicates that although both were raped in a location which was less closely tied to Delta's workplace than a layover hotel, each encountered subsequent problems with Young which further connected this harassment to Delta's work environment. *See* pp. 4-6, *supra.* This conduct was exacerbated by Young's intimidation of both women after the rapes occurred, and their continuing fear of encountering him again in the work place. *See, e.g., Bowers v. Radiological Society of North America, Inc.*, 101 F. Supp. 2d 691, 693 (N.D. Ill. 2000) (off-duty harassment which occurred in a private home was actionable where consequences of that conduct impacted work experience of the victim); *Aldridge v. State of Kansas*, 1997 U.S. Dist. LEXIS 15472 * 24 (D. Kansas 1997) (conduct outside workplace may be relevant to hostile work environment claim).

In addition, both Ballweg and Feingold came forward and placed Delta on notice of Young's "method of operation," and told Delta's management that they were concerned about the safety of other Delta Flight Attendants who unknowingly might place themselves in close quarters with Young. *Supra* at pp. 4-6. The work-related context of the harassment that both Ballweg and Feingold endured at the hands of Young, as well as their stated concerns predicting future danger for

other female Delta Flight Attendants, more than sufficiently raises a fact issue as to whether Delta failed to respond to known complaints of prior work place co-worker sexual harassment.[12]

Had these prior complaints been even partially credited by Delta management, it should have alarmed the airline. Instead, Petitioner's supervisory staff treated this information as inconsequential, even causing one Supervisor Ruhl to affirmatively refuse to file a written report (App. 16a), and subsequently another, Kathy Goldberger, to refuse to take any action because there was no prior documentation about Young's unlawful conduct. (JA-888: ¶ 22-23).

3. The Second Circuit's Decision is Not in Conflict With Other Circuit Court Decisions Defining The Scope of Employer Liability For Co-Worker Harassment.

Delta misrepresents that the Second Circuit's decision is in conflict with decisions from other Circuits, and that for this reason this Court should grant the Petition. Delta cites two Circuit Court of Appeals decisions, one an unpublished decision from the Tenth Circuit (with no precedential weight in that circuit), the other from the Sixth Circuit, and two district court decisions from the Seventh Circuit. Delta also cites a State Appellate Court decision from California. Not one of these decisions holds, as Delta suggests, that as a blanket rule, an employee who is assaulted while off-duty by a co-worker cannot maintain a Title VII claim against her employer.

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12. With regard to Young's harassment of Zachry, Delta cannot refute that most of Young's unwelcome advances, and intimidating conduct clearly took place in places which are part of its workplace: a Delta airplane, a Delta tram, and the airport tarmac while on duty. (App. 9a-10a).

For instance, in *Anderson v. Adam's Mark Hotels & Resorts*, 211 F. 3d 1277, 2000 U.S. App. LEXIS 15136 (10th Cir. 2000) (an unpublished decision), the Tenth Circuit did not hold that the plaintiff was barred from bringing a Title VII action against the hotel because the rape occurred after hours (although in the hotel itself, where apparently, plaintiff's co-worker had a room). Rather, the Tenth Circuit held that the Adam's Mark could not be held liable for the rape for two reasons which are distinguishable on the facts in the present case. First, because it was not foreseeable to the Adam's Mark that two of its employees would randomly socialize after work. *Id.* at * 6. In that employment situation, once employees left for the day, there was no predictable location that they might gather. That scenario is obviously contrasted to a flight layover situation where predictably Delta's Flight Attendants would congregate. Moreover, even in a situation far more remote in place than the layover, the after work social life of employees, the Tenth Circuit examined whether the hotel was on notice of any prior complaints which should have alerted the Adam's Mark that a co-worker presented a possible danger to its workforce. *Id.* at * 6-7. Clearly, in the case at bar, there were numerous reports which properly put Delta on notice.[13]

Similarly, in *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F. 3d 1344 , 1353-1354 (7th Cir. 1995), the Seventh Circuit did not hold that because the sexual harassment of the plaintiff took place at a striptease bar and at a lounge,

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13. Although there were allegations in this case that the hotel had received three prior reports concerning sexual harassment, these complaints pertained to the plaintiff's attacker attempting to date employees. Complaints about that type of misconduct could not fairly place the employer on notice that one of its employees might rape a co-worker. *Id.* at **1.

both undisputedly off-site and off-duty, that it was as a matter of law not actionable under Title VII. In fact, that court assumed that the alleged conduct, which was considerably less serious than the drugging and rape of Ferris, was actionable. A determination was made that plaintiff could not bring a Title VII claim against the company solely on the basis that the harasser's actions did not rise to the level of a hostile work environment. *Id.* There is no dispute in this case that the events pertaining to Ferris constitute a hostile work environment.

In addition, neither district court decision cited by Petitioner demonstrates a conflict in the Seventh Circuit with the Second Circuit's decision. In *Alvey v. Rayovac Corporation*, 922 F. Supp. 1315, 1329-1331 (W.D. WI. 1996), the district court granted the employer's motion for judgement as a matter of law because it found that she could not prove that the alleged conduct rose to the level of a hostile work environment and not because off-duty incidents, in and of themselves, could not be work-related. Moreover, *Alvey*, did not involve any sexual assaults against the plaintiff.

In *Hunter v. Countryside Association For The Handicapped, Inc.*, 723 F. Supp. 1277, 1278 (E.D. Ill. 1989), the district court held that the plaintiff could not maintain a Title VII claim against the employer for an off-duty rape because there was no evidentiary nexus to the workplace. That court specifically recognized that had there been evidence of prior complaints of harassment by Hunter, or another employee, the court would have assessed whether a further assault was reasonably foreseeable. *Id.* at 1278-79.

Even in *Capitol City Foods, Inc. v. The Superior Court* of Sacramento County, 5 Cal. App. 4th 1042, 7 Cal, Rptr, 2d 418 (1992), *review denied*, 1992 Cal. LEXIS 3655 (Cal. Supr.

Ct., July 16, 1992), which is of limited precedential weight to this Court, the California Appellate court recognized that the "harassing conduct need not occur in the workplace." 5 Cal. App. 4th at 1048. It only must occur in a "work-related context." *Id.* That court held that under California law, an employer may be liable for sexual harassment for social pursuits after work on the premises if the activity was *expressly or impliedly permitted* and the activity was conceivable of *some benefit to the employer* or was a *customary incident of the employment relationship.* 5 Cal. App. 4th at 1049. Clearly, ensuring that flight attendants comply with federal regulations regarding layovers and ensuring that they are rested in order to be able to service the next leg of a flight is of critical importance to Delta's business of flying planes.

4. The Second Circuit Did Not Hold That Employers Have a Duty To Monitor The Off-Duty Consensual Activities Of Its Employees.

Delta disingenuously argues that the Second Circuit's decision establishes a new, and higher standard for employer liability under Title VII. Petitioner claims that standard would force Delta, and other employers, to monitor off-duty conduct between its flight attendants, not just in layover hotels, but in the private bedrooms of their employees' homes. Delta argues that such a requirement would be impossible to meet, and at the same time would violate the privacy rights of its employees. (Petition p. 20).

Delta's interpretation of the Second Circuit's decision is wrong. The Second Circuit decision does not require that Delta intervene in the personal lives of its employees while off-duty, or specifically that Delta should bear legal

responsibility for failing to have monitored the voluntary conduct of either Ferris or Young while they were staying at the Savoy. An employer does not face liability for its failure to be an omniscient presence in its workplace, but for its negligence or recklessness in failing to discipline or fire one of its employees when it becomes known that this employee presents a possible future danger to its workforce; in other words for its failure to intervene to prevent further sexual assaults. *See* e.g., *Hollins v. Delta Air Lines, Inc.*, 238 F. 3d 1255, 1258 (10th Cir. 2001).

Neither does the fact that Ferris chose to enter Young's room — thereby making it a voluntary act — alter the analysis the Second Circuit correctly applied. Title VII does not require female employees to assume the risk of workplace violence when an employer has prior knowledge of such a danger . Once Delta knew that Young presented a risk of danger to its female employees it was charged under Title VII to take prompt and remedial action to remedy this known danger and to prevent future harm to other potential victims. *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 781 (10th Cir. 1995) (evidence of harassment of other women raises issue of material fact as to whether employer knew or should have known about harasser's prior conduct); *Paroline v. Unisys Corporation*, 879 F. 2d 100, 107 (4th Cir. 1989), *vacated* in part on different grounds, 900 F. 2d 27 (4th Cir. 1990). (Employer's knowledge about the harassment of other female employees highly relevant to the issue of whether employer should have reasonably anticipated that the harasser would repeat his conduct.) *See* also *Roderick v. New Hampshire Hospital*, 2000 U.S. Dist. LEXIS 1143 * 27 (D.N.H. 2000); *Munn v. The Mayor and Alderman of The City of Savannah*, 906 F. Supp. 1577, 1584 (S.D. Ga. 1995).

Delta's argument that because only *some* flight attendants *may* socialize together (Petition p. 11) it cannot be held responsible for any future harm perpetuated against its female work force by Young after being placed on notice of his propensity to rape flight attendants is both incorrect and misleading. Under applicable standards for determining employer negligence in Title VII co-worker sexual harassment cases, common law concepts of reasonable foreseeability and proximate cause should guide federal courts in determining the scope of an employer's responsibilities. *Hirase-Doi*, 61 F. 3d at 783. Title VII does not require an employer to predict with absolute certainty which of its employees in its workforce will be harmed if it does not take steps to curtail the dangerous conduct of a known perpetrator. It only requires that an employer assume the risk of a known danger in its workforce, here, Young, to the extent that the employer, Delta, can reasonably anticipate that such danger will repeat itself. *See*, e.g. *Hirase-Doi*, 61 F. 3d at 784 (*citing* Restatement (Second) of Agency 213, comment d, addressing dangerous employees). *See* also, *Armstrong v. Burlington Northern Railroad Co.*, 139 F. 3d 1277, 1279 (9th Cir. 1998): "[T]est of foreseeability does not require that the negligent person should have been able to foresee the injury in the precise form in which it in fact occurred. Rather it is sufficient if the negligent person might reasonably have foreseen that an injury *might* occur." (Emphasis added.) (Citations omitted.) This obligation is equally applicable, whether the workplace consists of one large office building, or a more expanded environment such as the one Delta Flight Attendants find themselves working in by virtue of the itinerant nature of the work.[14]

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14. Delta would not be able to successfully argue, if the facts were slightly different in this case, that had Young attacked a flight

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Moreover, Title VII does not require that Delta take steps to ensure with absolute certainty that it eliminates the likelihood of a known harasser, such as Young, from harming one of its female employees in the future. The employer's legal duty is discharged if it takes reasonable steps to discover and rectify acts of sexual harassment of its employees and prevent the harasser from harming other employees. *Baskerville v. Culligan International Company*, 50 F. 3d 428, 432 (7th Cir. 1995):

> What is reasonable depends on the gravity of the harassment. Just as in conventional tort law a potential injurer is required to take more care, other things being equal, to prevent catastrophic accidents than to prevent minor ones, so an employer is required to take more care, other things being equal, to protect its female employees from serious sexual harassment than to protect them from trivial harassment.

Id. (Citations omitted.) In accordance with these principles, the Second Circuit held that the duty of care Delta should have been held to was proportionate to the seriousness of the harm. (App. 15a).The court noted that Delta might have been held to a lesser standard of care had the reports of

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attendant in the back of an airplane, in one of its airport trams, or in a Delta Flight Attendant lounge that it would not be negligent for failing to respond to prior reports concerning Young's violent actions. Just as in this case, the probability that Young would attack any one flight attendant at any particular time cannot be predicted. Those flight attendants scheduled to fly with Young, however, would obviously be highly probable targets. Similarly, those same flight attendants, who after disembarking a Delta aircraft would stay in the same layover hotel as Young in a foreign city, would likely be future victims of an attack by Young.

Young's off-duty conduct prior to Ferris's sexual attack referred to "flirtation, sexual innuendo, or crude talk," as opposed to the "more serious threat" which the prior reports in this case alerted Delta about: the serious crime of rape. (App. 15a).

In the case at bar, what would have been a reasonable response by Delta to prior complaints about Young's dangerous conduct was never an issue. It is *undisputed* that Petitioner never took *any* action in response to the reports from three Delta Flight Attendants. (App. 7a, 9a-10a). While Title VII does not require that an employer "use the most serious sanction available to punish an offender", *Landsgraf v. USI Film Products*, 968 F. 2d 427, 430 (5th Cir. 1992), *aff'd* 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), a reasonable jury could certainly conclude that by the time Delta had received two reports that Young had raped two different Delta Flight Attendants, Young should have been fired. *See*, e.g., *Baskerville*, 50 F. 3d at 432 (reasonable for employer to fire harasser "on the spot" had he assaulted even one employee). If Young had not been employed by Delta on March 16, 1998, he would not have flown a Delta flight with Ferris to Rome, where they both worked in the same cabin. If Young had not been part of Ferris's flight crew, and she had met him at the Savoy, she would not have casually joined a stranger for lunch in his hotel room. Therefore, had Young been removed from the workplace, Ferris would never have been drugged or raped.

The Second Circuit decision does not establish a new legal precedent for employer liability. It merely affirms this Court's admonition that Title VII's "primary objective is not to provide redress for [harassed employees], but to avoid the harm" in the first place. *See Faragher*, 524 U.S. at 805-806,

118 S. Ct. at 2292 (*citing Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417, 95 S. Ct. 2362, 2371, 45 L. Ed. 2d 280 (1975)). The Second Circuit applied this objective to the special circumstances pertaining to airline employees, and the grave nature of the sexual harassment in this case, violent sexual acts against its female flight attendants.

Delta strenuously objects to what it erroneously claims the Second Circuit is mandating: too much intervention in the lives of its co-workers. In reality, this case is simply about how little Delta did to prevent the brutal rape of Ferris by Young. Was some response to the prior complaints really too much to expect? Although Delta did not fire Young from his employment, after Ferris reported his conduct, (but permitted him to resign because he stopped cooperating with the investigators) (App. 6a), he is now gone from Delta's workforce. Because Young is no longer employed by Delta, other female Delta Flight Attendants are spared from encountering Young through their employment for Delta and erroneously putting their trust in him because he was a fellow flight attendant, even to the extent of allowing themselves to be in close proximity to Young behind closed doors. This case is solely then about Delta's failure to act. The Second Circuit understood this, and its decision is fully in accordance with well established principles developed under Title VII law.

CONCLUSION

For the reasons stated above, the writ of *certiorari* should be denied.

Respectfully submitted,

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